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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**
9 **AT RICHLAND**

10 BRENT MCFARLAND,

11 Plaintiff,

12 v.

13 BNSF RAILWAY COMPANY,

14 Defendant.
15

No. 4:16-CV-05024-EFS

**STIPULATED PROTECTIVE
ORDER**

16 1. PURPOSES AND LIMITATIONS
17

18 Discovery in this action is likely to involve production of confidential,
19 proprietary, or private information for which special protection may be warranted.
20 Accordingly, the parties hereby stipulate to and petition the court to enter the
21 following Stipulated Protective Order. It does not confer blanket protection on all
22 disclosures or responses to discovery, the protection it affords from public
23 disclosure and use extends only to the limited information or items that are entitled
24 to confidential treatment under the applicable legal principles, and it does not
25 presumptively entitle parties to file confidential information under seal.
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27

1 2. “CONFIDENTIAL” MATERIAL

2 “Confidential” material shall include the following documents and tangible
3 things produced or otherwise exchanged: information regarding employees other
4 than plaintiff and information regarding BNSF not otherwise accessible to the
5 general public.
6

7 3. SCOPE

8 The protections conferred by this agreement cover not only confidential
9 material (as defined above), but also (1) any information copied or extracted from
10 confidential material; (2) all copies, excerpts, summaries, or compilations of
11 confidential material; and (3) any testimony, conversations, or presentations by
12 parties or their counsel that might reveal confidential material. However, the
13 protections conferred by this agreement do not cover information that is in the
14 public domain or becomes part of the public domain through trial or otherwise.
15

16 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

17 4.1 Basic Principles. A receiving party may use confidential material that
18 is disclosed or produced by another party or by a non-party in connection with this
19 case only for prosecuting, defending, or attempting to settle this litigation.
20

21 Confidential material may be disclosed only to the categories of persons and under
22 the conditions described in this agreement. Confidential material must be stored
23 and maintained by a receiving party at a location and in a secure manner that
24 ensures that access is limited to the persons authorized under this agreement.
25

26 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
27 otherwise ordered by the court or permitted in writing by the designating party, a

1 receiving party may disclose any confidential material only to:

2 (a) the receiving party's counsel of record in this action, as well as
3 employees of counsel to whom it is reasonably necessary to disclose the
4 information for this litigation;

5 (b) the officers, directors, and employees (including in-house counsel) of the
6 receiving party to whom disclosure is reasonably necessary for this litigation,
7 unless the parties agree that a particular document or material produced is for
8 Attorney's Eyes Only and is so designated;

9 (c) experts and consultants to whom disclosure is reasonably necessary for
10 this litigation and who have signed the "Acknowledgment and Agreement to Be
11 Bound" (Exhibit A);

12 (d) the court, court personnel, and court reporters and their staff;

13 (e) copy or imaging services retained by counsel to assist in the duplication
14 of confidential material, provided that counsel for the party retaining the copy or
15 imaging service instructs the service not to disclose any confidential material to
16 third parties and to immediately return all originals and copies of any confidential
17 material;

18 (f) during their depositions, witnesses in the action to whom disclosure is
19 reasonably necessary and who have signed the "Acknowledgment and Agreement
20 to Be Bound" (Exhibit A), unless otherwise agreed by the designating party or
21 ordered by the court. Pages of transcribed deposition testimony or exhibits to
22 depositions that reveal confidential material must be separately bound by the court
23 reporter and may not be disclosed to anyone except as permitted under this
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1 agreement;

2 (g) the author or recipient of a document containing the information or a
3 custodian or other person who otherwise possessed or knew the information.

4 4.3 Filing Confidential Material. Before filing confidential material or
5 discussing or referencing such material in court filings, the filing party shall confer
6 with the designating party to determine whether the designating party will remove
7 the confidential designation, whether the document can be redacted, or whether a
8 motion to seal or stipulation and proposed order is warranted. Local Civil Rule
9 5(g) sets forth the procedures that must be followed and the standards that will be
10 applied when a party seeks permission from the court to file material under seal.
11

12 5. DESIGNATING PROTECTED MATERIAL

13 5.1 Exercise of Restraint and Care in Designating Material for Protection.
14 Each party or non-party that designates information or items for protection under
15 this agreement must take care to limit any such designation to specific material that
16 qualifies under the appropriate standards. The designating party must designate for
17 protection only those parts of material, documents, items, or oral or written
18 communications that qualify, so that other portions of the material, documents,
19 items, or communications for which protection is not warranted are not swept
20 unjustifiably within the ambit of this agreement.
21

22 Mass, indiscriminate, or routinized designations are prohibited. Designations
23 that are shown to be clearly unjustified or that have been made for an improper
24 purpose (e.g., to unnecessarily encumber or delay the case development process or
25 to impose unnecessary expenses and burdens on other parties) expose the
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1 designating party to sanctions.

2 If it comes to a designating party's attention that information or items that it
3 designated for protection do not qualify for protection, the designating party must
4 promptly notify all other parties that it is withdrawing the mistaken designation.
5

6 5.2 Manner and Timing of Designations. Except as otherwise provided in
7 this agreement, or as otherwise stipulated or ordered, disclosure or discovery
8 material that qualifies for protection under this agreement must be clearly so
9 designated before or when the material is disclosed or produced.

10 (a) Information in documentary form: (e.g., paper or electronic documents
11 and deposition exhibits, but excluding transcripts of depositions or other pretrial or
12 trial proceedings), the designating party must affix the word "CONFIDENTIAL"
13 to each page that contains confidential material. If only a portion or portions of the
14 material on a page qualifies for protection, the producing party also must clearly
15 identify the protected portion(s) (e.g., by making appropriate markings in the
16 margins).
17

18 (b) Testimony given in deposition or in other pretrial or trial proceedings:
19 the parties must identify on the record, during the deposition, hearing, or other
20 proceeding, all protected testimony, without prejudice to their right to so designate
21 other testimony after reviewing the transcript. Any party or non-party may, within
22 fifteen days after receiving a deposition transcript, designate portions of the
23 transcript, or exhibits thereto, as confidential.
24

25 (c) Other tangible items: the producing party must affix in a prominent place
26 on the exterior of the container or containers in which the information or item is
27

1 stored the word "CONFIDENTIAL." If only a portion or portions of the
2 information or item warrant protection, the producing party, to the extent
3 practicable, shall identify the protected portion(s).

4 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
5 failure to designate qualified information or items does not, standing alone, waive
6 the designating party's right to secure protection under this agreement for such
7 material. Upon timely correction of a designation, the receiving party must make
8 reasonable efforts to ensure that the material is treated in accordance with the
9 provisions of this agreement.

10 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

11 6.1 Timing of Challenges. Any party or non-party may challenge a
12 designation of confidentiality at any time. Unless a prompt challenge to a
13 designating party's confidentiality designation is necessary to avoid foreseeable,
14 substantial unfairness, unnecessary economic burdens, or a significant disruption
15 or delay of the litigation, a party does not waive its right to challenge a
16 confidentiality designation by electing not to mount a challenge promptly after the
17 original designation is disclosed.

18 6.2 Meet and Confer. The parties must make every attempt to resolve any
19 dispute regarding confidential designations without court involvement. Any motion
20 regarding confidential designations or for a protective order must include a
21 certification, in the motion or in a declaration or affidavit, that the movant has
22 engaged in a good faith meet and confer conference with other affected parties in
23 an effort to resolve the dispute without court action. The certification must list the

1 date, manner, and participants to the conference. A good faith effort to confer
2 requires a face-to-face meeting or a telephone conference.

3 6.3 Judicial Intervention. If the parties cannot resolve a challenge without
4 court intervention, the designating party may file and serve a motion to retain
5 confidentiality under Local Civil Rule 7 (and in compliance with Local Civil Rule
6 5(g), if applicable). The burden of persuasion in any such motion shall be on the
7 designating party. Frivolous challenges, and those made for an improper purpose
8 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may
9 expose the challenging party to sanctions. All parties shall continue to maintain the
10 material in question as confidential until the court rules on the challenge.
11

12 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
13 IN OTHER LITIGATION
14

15 If a party is served with a subpoena or a court order issued in other litigation
16 that compels disclosure of any information or items designated in this action as
17 “CONFIDENTIAL,” that party must:

18 (a) promptly notify the designating party in writing and include a copy of the
19 subpoena or court order;
20

21 (b) promptly notify in writing the party who caused the subpoena or order to
22 issue in the other litigation that some or all of the material covered by the subpoena
23 or order is subject to this agreement. Such notification shall include a copy of this
24 agreement; and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued
26 by the designating party whose confidential material may be affected.
27

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
 3 confidential material to any person or in any circumstance not authorized under
 4 this agreement, the receiving party must immediately (a) notify in writing the
 5 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
 6 all unauthorized copies of the protected material, (c) inform the person or persons
 7 to whom unauthorized disclosures were made of all the terms of this agreement,
 8 and (d) request that such person or persons execute the “Acknowledgment and
 9 Agreement to Be Bound” that is attached hereto as Exhibit A.
 10

11 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
 12 PROTECTED MATERIAL
 13

14 When a producing party gives notice to receiving parties that certain
 15 inadvertently produced material is subject to a claim of privilege or other
 16 protection, the obligations of the receiving parties are those set forth in Federal
 17 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
 18 whatever procedure may be established in an e-discovery order or agreement that
 19 provides for production without prior privilege review. Parties shall confer on an
 20 appropriate non-waiver order under Fed. R. Evid. 502.
 21

22 10. NON TERMINATION AND RETURN OF DOCUMENTS

23 Within 60 days after the termination of this action, including all appeals,
 24 each receiving party must return all confidential material to the producing party,
 25 including all copies, extracts and summaries thereof. Alternatively, the parties may
 26 agree upon appropriate methods of destruction.
 27

1 Notwithstanding this provision, counsel are entitled to retain one archival
2 copy of all documents filed with the court, trial, deposition, and hearing transcripts,
3 correspondence, deposition and trial exhibits, expert reports, attorney work
4 product, and consultant and expert work product, even if such materials contain
5 confidential material.
6

7 The confidentiality obligations imposed by this agreement shall remain in
8 effect until a designating party agrees otherwise in writing or a court orders
9 otherwise.

10 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

11 DATED: 10/9/2016
12 Adam R. Pechtel
13

14 Attorneys for Plaintiff

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16 DATED: 10/10/2016
17 [Signature]
18

19 Attorneys for Defendant

20
21 PURSUANT TO STIPULATION, IT IS SO ORDERED.

22 DATED: 10-11-2016
23 Edward F. Shea
24

25 HONORABLE EDWARD F. SHEA

26 United States District Judge
27

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
 _____ [print or type full address], declare under penalty of
 perjury that I have read in its entirety and understand the Stipulated Protective Order
 that was issued by the United States District Court for the Western District of
 Washington on [date] in the case of _____ [insert formal name of the case
 and the number and initials assigned to it by the court]. I agree to comply with and
 to be bound by all the terms of this Stipulated Protective Order and I understand and
 acknowledge that failure to so comply could expose me to sanctions and punishment
 in the nature of contempt. I solemnly promise that I will not disclose in any manner
 any information or item that is subject to this Stipulated Protective Order to any
 person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court
 for the Western District of Washington for the purpose of enforcing the terms of this
 Stipulated Protective Order, even if such enforcement proceedings occur after
 termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____